No. ____

Supreme Court, U.S.
FILED

06-704 NOV 17 2006

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IN THE

Supreme Court of the United States

NICHOLAS SABO,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the judicial power to determine what types of scientific tests are admissible be delegated by the legislature to an administrative agency and, if so, can a defendant be prohibited from introducing evidence which questions the general reliability of the approved test method?

2. Where a scientific test result has been found admissible by a preponderance of the evidence in a pre-trial hearing, is the mere test result sufficient to constitute the sole proof of an element of an offense if no foundational evidence was submitted to the jury?

3. When offered by a defendant in a criminal case, can speculative evidence constitutionally be barred if it raises a reasonable doubt about a relevant issue?

PARTIES TO THE PROCEEDING

The parties to this matter are Nicholas Sabo and the State of Ohio.

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OPINIONS BELOW

Ohio Supreme Court did not issue a formal opinion. Instead, a summary decision refusing jurisdiction was issued (App., *infra*, 22a). *State v. Sabo*, 2006-0946 08/23/2006 Case Announcements, 2006-Ohio-4288. The Decision of the Court of Appeals for Franklin County, Ohio, (App., *infra*, 4a) has not been officially reported. The web cite is *State v. Sabo*, 2006-Ohio-1521 (March 30, 2006).

JURISDICTION

The Judgment of the Court of Appeals for Franklin County, Ohio, Tenth Appellate District was entered on March 30, 2006. On August 23, 2006, the Ohio Supreme Court denied jurisdiction to appeal. The jurisdiction of this court lies under 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

United States Constitution Amendment V

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

United States Constitution Amendment VI

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and * * * to be confronted with the witnesses against him; * * *"

STATEMENT OF THE CASE

The Petitioner was the defendant in a drunk driving case below. What is known as a suppression hearing was held in the trial court, sitting without a jury (Ohio officially mischaracterizes many issues which are in fact *in limine* issues as suppression issues). The foundational evidence dealing with the reliability of the testing machine and testing process was presented to the court at that time. Following the hearing, a written decision was issued in which the breath test result was expressly found admissible using the preponderance of the evidence standard set forth in Ohio case law.

Thereafter, the mere test result was presented to the jury without any foundational testimony regarding the reliability of the testing machine or testing process. The test result was the only evidence offered to the jury on the element of a prohibited concentration of alcohol in the defendant's breath. During opening statement, defense counsel indicated the evidence would show a reasonable doubt as to whether the breath test was accurate. This was the key issue in the case. The prosecution objected on the basis of doctrine set forth in *State v. Vega*, (1984) 12 Ohio St.3d 185, an Ohio Supreme Court case, which in essence prohibits litigation of the general reliability of the breath testing machine once the testing machine has been approved by the Ohio Department of

Health. While the prosecution did not then cite *Vega*, the court later expressly grounded its ruling upon that case (Trial Transcript p. 252 l, 25 — 253 l. 11, App. 39a).

The trial court ruled the defendant's only defense inadmissible. Counsel was instructed not to mention the issue further in opening statement and not to present evidence to this effect. A written proffer (App. 29a) was filed setting forth the defense which would have been presented. The defense was that both the testing machine and the testing process were inadequate to prevent sample contamination due to gastro esophageal reflux disease (hereinafter GERD). In GERD, stomach gasses or alcohol from the stomach contaminates the breath sample which is supposed to consist of only deep lung air.

This defense is factually true and is tacitly admitted to be true by the Ohio Department of Health, the manufacturer of the testing machine, the National Safety Counsel and the prosecution. Despite this, the court ruled that it was speculative and prohibited by *Vega*. The jury was instructed that it had to believe the test was accurate and a verdict was rendered against the defendant.

In short, the reliability of the test result was the key issue in the case below. What scant evidence there was on this issue was submitted only to the court and not to the jury. Furthermore, only the preponderance standard was used. No evidence of reliability was submitted to the jury. The defense was prohibited from offering scientifically valid evidence questioning the reliability of the test. The jury was instructed that it could not question the general reliability of the test. The Court of Appeals affirmed on the basis of *Vega* and the Ohio Supreme Court refused to entertain a discretionary appeal.

The conclusive presumption and reasonable doubt issues were raised in response to the prosecutor's objection on opening statement (e.g. Trial Transcript p.203 l. 14- p. 204 l. 9). The trial court sustained the prosecution's objection on the basis of *State v. Vega*, (1984) 12 Ohio St.3d 18 (Trial Transcript p. 252 l, 25 — 253 l. 11, App. 39a). These issues were also raised in numerous places in the briefs at the Court of Appeals and the Ohio Supreme Court levels. The appellate courts upheld the lower court's decisions.

The confrontation issue was raised orally at trial by the defense when the prosecution sought to introduce the documents containing the breath test result. *Crawford vs. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 was specifically raised several times (e.g. Trial Transcript p. 397 l. 24-p. 399 l. 11, App. 44a). It was likewise raised in many places in the briefs in the Franklin County Court of Appeals and the Ohio Supreme Court. All three courts rejected these arguments.

This court's decision in *Holmes v. South Carolina* (May 01, 2006), ___- S.Ct. ___-, 126 S.Ct. 1727, 164 L.Ed.2d 503 was not set forth until the jurisdictional brief submitted to the Ohio Supreme Court. The reason for this is that *Holmes* had not been decided until then. Other cases on the *Holmes* issues were cited in the lower courts.

REASONS FOR GRANTING THE PETITION

A. Ohio law is in radical opposition with the Constitution and numerous cases decided by this court.

For the last 24 years, Ohio has taken the position that the Constitution does not apply to drunk driving cases. This is not defense attorney hyperbole. It is the position

of the chief appellate prosecutor in the busiest court in the state as set forth in its brief below: "The question of what type of evidence may be presented in an OVI case in the State of Ohio is not governed by the Confrontation Clause. Rather it is determined by *Vega*. . .[*supra*]". Brief of Appellee 26.

The state of the law in Ohio is so abysmal that the government in its brief below contended that appellant was asserting a novel concept by maintaining that proof beyond a reasonable doubt should be required in a drunk driving case: "Once again, Appellant is seeking to place a heretofore unknown burden upon the State requiring it to first have evidence found admissible and then requiring proof beyond a reasonable doubt that the evidence is credible." Brief of Appellee, 35.

The assertion that the Constitution does not apply to drunk driving cases in Ohio will once again be proven correct unless this court accepts jurisdiction. Ohio courts have repeatedly demonstrated an unwillingness to change their position and recent changes to federal *habeas corpus* law have made review on the merits in lower federal courts essentially impossible.

Ohio has created an illegal conclusive presumption and barred the defendant from rebutting it. While this alone is a serious constitutional defect, Ohio takes the further radical step of eliminating the need for the prosecution to submit proof of the premise giving rise to the presumption to the trier of fact. The premise, proven only by a preponderance at a motion hearing, is then combined with the unconstitutional presumption to form the sole proof of the central evidence in the case.

The decision of the Ohio Supreme Court in *Vega, supra,* is also in conflict with many decisions of this court, especially *Holmes, supra*, *Francis vs. Franklin*

(1985), 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed 2d 344; *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435; *Blakely vs. Washington*, (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *Crawford vs. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

B. Ohio law conflicts with that of other states.

Ohio law is in conflict with decisions from the Supreme Courts of Hawaii and Illinois as well as lower courts in Alaska, Massachusetts, and Minnesota. In *State v. Lowther* (1987), 7 Haw.App. 20, 740 P.2d 1017, the Hawaii Supreme Court declined to follow *Vega*. The court's opinion does a good job of outlining the differences between the Ohio position and that of other states:

> Citing *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), [FN6 omitted] the State contends that the reliability of the Intoxilyzer has been legislatively resolved and is not subject to attack by Defendant. The *Vega* line of reasoning may be summarized as follows:
>
> An accused may not use expert testimony to attack the general reliability of intoxilyzers as valid, reliable breath-testing machines, in view of the fact that the General Assembly has legislatively provided for the admission of such tests if analyzed in accordance with methods approved by the Director of Health. *City of Columbus v. Day*, 24 Ohio App.3d 173, 174, 493 N.E.2d 1002, 1003 (1985).
>
> In our view, even if legislation validly provides for the admissibility of Intoxilyzer test results, their admissibility does not automatically equate with the sufficiency of the evidence to establish an unadmitted material fact. See *City of Columbus v. Day, 24 Ohio App.3d 173, 174, 493 N.E.2d 1002, 1003.*

Commentary to Rule 401, Hawaii Rules of Evidence (HRE), HRS Chapter 625 (1985). "[T]he Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact." *State v. Burling*, 224 Neb. 725, 730, 400 N.W.2d 872, 876 (1987). See also *State v. Boehmer*, 1 Haw.App. 44, 613 P.2d 916 (1980). "[I]t is a judicial function to determine whether the evidence, if believed, is sufficient to sustain a conviction." *Burling*, 224 Neb. at 730, 400 N.W.2d at 876. Thus, the test results are not "unassailable." *Keel v. State*, 609 P.2d 555, 557 (Alaska 1980). Moreover, we doubt that the Intoxilyzer's general reliability may be judicially noticed as an adjudicative fact by the trial court. See Rule 201, HRE.

Thus, we side with other courts that have recognized the defendants' right to challenge the general reliability of breath testing devices. For example, an Alaskan court has held:

> Even after the admission of the breathalyzer test results, the burden is still upon the municipality to convince the jury that the breathalyzer test is accurate and that the defendant's blood or breath alcohol was above the prohibited level at the time of driving. Should the defendant have reason to believe that the test results inaccurately reflect his actual blood or breath alcohol concentrations, he can adequately confront the test through the usual tools which he has at his disposal in confronting any witness or evidence. He can rely on the fact that the municipality has the burden of proof, he can rely on cross examination, or he can present evidence on his own.

Cooley v. Municipality of Anchorage, 649 P.2d 251, 255 (Alaska App.1982). Although Cooley

referred to a breathalyzer and not the Intoxilyzer, the above principles are applicable here. See *Commonwealth v. Smythe*, 23 Mass.App.Ct. 348, 502 N.E.2d 162 (1987); *26 *Hounsell v. Commissioner of Public Safety*, 401 N.W.2d 94 (Minn.App.1987); *State v. Burling, supra.*

We find the dissenting opinion in *State v. Vega* [FN7] very persuasive. It states:

> Under the Constitutions of the state of Ohio and the United States all persons accused of crime have the right to present their own evidence including expert testimony. . . . There is no prohibition against the presentation of expert medical testimony by the accused to show the nonexistence of any nexus between the test results and the physical condition of the accused.
>
> * * *
>
> The rule-making power of the Director of Health can never deprive a defendant of his constitutional right to present all relevant evidence in his defense to the crime with which he is charged.
>
> 12 Ohio St.3d at 190, 465 N.E.2d at 1308.
>
> FN7. The Ohio Supreme Court split 4-3 in the *State v. Vega* decision. The majority issued a per curiam opinion. Justice Clifford F. Brown wrote the dissenting opinion.

Lowther, supra, 740 P.2d 1020-1021.

While it does not specifically discuss *Vega, People vs. Bonutti*, 212 Ill.2d 182, 817 N.E.2d 489, 288 Ill.Dec. 131 (Sept. 23, 2004) expressly allowed the GERD defense which was excluded in the case at bar on the basis of *Vega*. In short, there is a clear conflict between the states.

C. Local procedural and evidence peculiarities should not be allowed to serve as a shield to permanently deflect constitutional challenges.

There is a procedural device which has helped this issue evade review for a generation. Without delving too deeply into the intricacies of Ohio law, the practice is as follows: The state charges the defendant with two related types of drunk driving offenses. The defendant can be found guilty of both but only sentenced on one. The state uses the test to gain a conviction on the non-test charge and then elects to sentence on that charge rather than the test charge. It then claims that errors regarding the test are moot since the defendant was not sentenced on the test charge. This device has been fairly effective in allowing blatant unconstitutionality to persist. It is submitted that this technique falls within the "capable of repetition yet evading review" exception to the mootness doctrine. See *Murphy v. Hunt*, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (U.S.Neb. Mar 02, 1982) and *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686, 56 USLW 4091, 43 Ed. Law Rep. 857, 1 A.D.D. 333 (U.S.Cal. Jan 20, 1988).

Excluding evidence of innocence is one of the most fundamental violations of due process possible. Because such a violation is, of necessity, couched in evidentiary terms, it has a much greater tendency to be overlooked by courts. Courts tend to apply the abuse of discretion standard to evidentiary matters and are reluctant to reverse on that ground. Appellate courts deciding whether to accept jurisdiction of a matter see that it is couched in evidentiary terms and move on to the next case. Thus, the most fundamental of violations occurs, yet it tends to be overlooked due to the manner in which the issue is framed and because it is thought to be error

correction in an individual case rather than a matter of general importance.

Appellate opinions which base their decision on defendant's failure to introduce some hypothetical evidence that did not exist are much less likely to be reversed than decisions that indicate that evidence of innocence may be excluded. Ohio law requires the exclusion of the most important evidence of innocence in all breath test cases. Thus what happened in the case at bar is not an unfortunate but isolated mistake. It is a typical example of the general rule that results in the routine violation of one of the most basic rights that is supposed to be afforded to criminal defendants. It is also a typical example of the devices which have been used to avoid a decision on the merits on this issue for nearly a quarter of a century.

D. Discussion of questions presented.

1. The judicial power to determine what types of scientific tests are admissible cannot be delegated by the legislature to an administrative agency nor, can a defendant be prohibited from introducing evidence which questions the general reliability of the approved test method

a. Substituting a bureaucratic determination of reliability of evidence for a judicial one deprived the defendant of his right to trial, his right to confront witnesses, and his right to proof beyond a reasonable doubt.

The defendant has a right to a judicial determination of the reliability of the evidence against him. Allowing that decision to be made by a bureaucrat substitutes his

decision for that of a judge or jury. That decision is also untested by the process of cross examination nor is it subject to the proof beyond a reasonable doubt standard. See *Apprendi supra,* and *Blakely, supra.* He has a right to confront his accusers *Crawford, supra.*

The lack of judicial safeguards in Ohio has resulted in the current state of affairs where the bureaucrat who drafted the bulk of the current regulations was fired for testifying falsely. His current counterpart who approves the testing machines now used is a former police officer with no scientific credentials. The jury, however, cannot be told of such facts. They are told that they cannot consider the general reliability of the testing machine.

b. Barring defendants from challenging the bureaucratic determination of reliability creates an unconstitutional mandatory conclusive presumption.

The unusual thing about Ohio is that once the bureaucrat concludes that a particular testing machine is generally reliable, the courts will not allow that determination to be challenged in the criminal case. See *Vega, supra.* This peculiarity results in an unconstitutional mandatory conclusive presumption.

The problems the testing machines have with sample contamination is an issue of general reliability. The machine does not have to be broken to register an inaccurate result (Proffer, App. 29a). By prohibiting general reliability challenges, Ohio essentially bars the most prevalent exculpatory evidence in breath test cases.

In the case at bar, there simply was no evidence presented to the jury that the machine was generally reliable. The test result which establishes the element of a prohibited concentration is only meaningful and admissible if the testing process is generally reliable.

If, as was the case in the instant matter, general reliability is not proven, the question then becomes whether whether or not a presumption can be substituted for proof. The area of presumptions raises one of the most difficult issues known to the criminal law. A good review of the law in this area is found in *Francis vs. Franklin* (1985), 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed 2d 344:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S., at 364, 90 S.Ct., at 1073 . This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, 90 S.Ct., at 1072, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v. Montana*, supra, at 520-524, 99 S.Ct., at 2457-2459; *Patterson v. New York*, 432 U.S. 197, 210, 215, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 698-701, 95 S.Ct. 1881, 1889-1890, 44 L.Ed.2d 508 (1975); see also *Morissette v. United States*, 342 U.S. 246, 274-275, 72 S.Ct. 240, 255, 96 L.Ed 288 (1952).
>
> * * *
>
> The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." *Id.*, at 514, 99 S.Ct., at 2454. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see *id.*, at 520-

524, 99 S.Ct., at 2457-2459, or merely a permissive inference, see *Ulster County Court v. Allen,* 442 U.S. 140, 157-163, 99 S.Ct. 2213, 2224-2227, 60 L.Ed.2d 777 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. [FN2] A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

Mandatory presumptions must be measured against the standards of *Winship* as elucidated in *Sandstrom*. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. *Patterson v. New York*, *supra*, 432 U.S., at 215, 97 S.Ct., at 2329 ("[A] State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). See also *Sandstrom*, supra, 442 U.S., at 520-524, 99 S.Ct., at 2457-2459; *Mullaney v. Wilbur, supra*, 421 U.S., at 698-701, 95 S.Ct., at 1889-1890 .

FN2. A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. See *Sandstrom v. Montana*, 442 U.S. 510, 517- 518, 99 S.Ct. 2450, 2455-2456, 61 L.Ed.2d 39 (1979) .

Id, 471 U.S. 313-314, 105 S. Ct. 1970-1971.

> The jurors "were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." *Ibid.* (emphasis added). . . . the instructions "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ulster County Court v. Allen, supra*, 442 U.S., at 156, 99 S.Ct., at 2224 (emphasis added).

Id, 471 U.S. 316-317, 105 S. Ct. 1972.

> An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. *A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional.* Our cases make clear that "[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Patterson v. New York*, 432 U.S., at 215, 97 S.Ct., at 2329 .

Id, 471 U.S. 317-318, 105 S. Ct. 1972-1973 (emphasis added).

An example might help illustrate the matter. Under the common law there was a presumption of legitimacy if a child was born during the marriage and if the putative father was not beyond the four seas during the preceding nine months. J. Strong, *McCormick on Evidence*, § 343 p. 442 fn23 (5th ed, Vol. 2, 1999). Once the premise, that the child was born during the marriage and that the parent was not beyond the four seas, was proven, it was mandatory for the jury to believe the conclusion that the child was legitimate. Thus the conclusion had to be accepted even if there was obvious evidence to the contrary. Although couched as a presumption, this was really a public policy decision. The courts understood that there were situations other than being on the high seas that could account for illegitimacy. They simply made a policy decision to ignore evidence to the contrary. At the time there was a strong stigma against illegitimate children and it was felt that the sins of the parents should not be visited upon the children.

This may very well explain Ohio law. Rather than an actual decision based upon science, it may have been decided that convicting people accused of drunk driving is so important and calling witnesses and proving the case such a nuisance, that convictions without proof will be allowed as a matter of policy. The problem is, of course, public policy decisions cannot override the Constitution.

The presumption in Ohio is one level more harsh and more unconstitutional than the presumption of legitimacy. At least in that instance, the premise itself had to be proven to the jury. The jury had to find that the child was born during the marriage and that the father was not "beyond the four seas". If the jury does not believe the premise, it is not required to conclude that the child is legitimate. In drunk driving cases, the unusual thing is

that the premise itself is not even presented to the jury. The judge hears the premise in the suppression hearing and then instructs the jury that conclusion is true.

The trial court clearly felt that the presumption of general reliability of the breath test could not be rebutted by the defendant. In response to a query by counsel the court stated:

> . . .I believe you're perfectly aware that he's [defendant's expert] not allowed to talk about general reliability, the fact that he believes that two tests need to be given in every case, and other such evidence that might put into question the reliability of the test.

(App. 42a, Trial Transcript, p. 268 l. 7-11).

The judge further instructed the jury as follows:

> *The general reliability of breath-testing machines is not an issue in this trial.* However, you, the jury, may consider any evidence presented regarding the defendant's specific test and the specific machine used to test him. Evidence has been admitted about the results of a test given to the defendant to establish the concentration of alcohol in the defendant's breath. You must evaluate all the evidence presented regarding the test and its accuracy.

(App. 44a, Trial Transcript, p. 450 l. 14-18 emphasis added).

If the general reliability of the breath testing machine must be believed by the jury unless rebutted, then there is a mandatory conclusive presumption of general reliability. ~~If the~~ general reliability of the breath testing machine cannot be rebutted, then is an irrebuttable mandatory conclusive presumption. Both are illegal. The jury instruction would be constitutional if, and only if,

the jury was instructed that it may, but is not required to, believe that the breath testing machine is generally reliable.

It is hard to think of a much clearer way of shifting the burden of persuasion than to have the judge tell the jury they must believe an element of the prosecution's case without proof while simultaneously denying the defendant any opportunity to offer proof to the contrary on the issue. Except in the case of affirmative defenses, shifting the burden of persuasion to the defense is always unconstitutional. See *Francis, supra.*

The court apparently felt that because some defenses can be raised in drunk driving cases, this made the presumption rebuttable. The court repeatedly indicated that specific challenges such as a breakdown of the particular machine could be raised. The implication being that this made any presumption rebuttable and therefore constitutional. See, for example, Trial Transcript, p. 268, l. 16-19 (App. 42a).

Attempts to justify mandatory conclusive presumptions by characterizing them as rebuttable betrays an important and fundamental misunderstanding of the nature of mandatory presumptions. There is a widespread view that rebuttable presumptions are constitutional and irrebuttable ones are not. The two terms are actually subspecies of unconstitutional presumptions. While this misconception is in large part due to the misuse of language, it also masks an important constitutional infirmity that goes to the very heart of the due process clause. The need for clarification of this issue is an additional reason that this case should be accepted for review.

While the common misconception is that rebuttable presumptions are constitutional and irrebuttable conclusions are not, the actual distinction is not between

rebuttable and irrebuttable presumptions. Instead, it is between conclusive presumptions and permissive inferences. Even rebuttable presumptions are unconstitutional if they are mandatory. A mandatory presumption tells the jury that if the premise is shown, the conclusion must be accepted. Making a mandatory presumption subject to rebuttal does not mean that it is no longer mandatory, it merely leaves the door open so that the defendant may have the opportunity to reverse the effects of the presumption with other evidence. The problem is that this sort of presumption switches the burden of proof from the state to the defendant. Such a reversal is constitutionally infirm because the Constitution requires that burden to remain at all times on the state.

If, instead, a permissive inference is used where the jury is told that it may, but is not required to accept a certain conclusion this is constitutionally acceptable because the burden of proof remains upon the state. The term "rebuttable" implies that the burden of proof can shift to the defendant. While this is permissible in a civil case, it is forbidden in a criminal case (excepting affirmative defenses). Thus using the term "rebuttable" in an attempt to show that a presumption is constitutional actually shows the reverse. Its use indicates that the burden of proof has been shifted from the prosecution to the defense. This, of course, is what happened in the case at bar.

Another hypothetical example may be of benefit. Suppose there was a murder case where the uncontroverted evidence showed that the killer weighed less than 250 pounds. The defendant's only available defense was that he could not be the killer because he weighed 275 pounds. Unfortunately for him, he was weighed on a scale that was approved for forensic purposes by legislatively authorized state regulation, the regulations

were followed, and that the scale indicated a weight of 240 pounds. The defendant attempts to prove that the dial on the scale has a maximum reading of 240 pounds and that it would be impossible for anyone to weigh more than 250 pounds on this scale.

The court rules that the defendant can show that the regulations were not followed, that the particular scale is broken, or that he was in a different city at the time of the crime; but, he cannot argue that scales of that design are incapable of accurately weighing people heavier than 240 pounds. He cannot challenge the general reliability of the approved scale. The judge instructs the jury that the scale's general reliability and its ability to weigh someone heavier than 240 pounds are not matters for it to consider.

In this example, the general reliability of the scale is being conclusively presumed. The jury is being told that the scale accurately weighs people over 240 pounds and the defendant was barred from challenging that conclusion.

While showing that the individual machine was broken may indeed be a way of showing that the weight was inaccurate, allowing such evidence only lets the defendant challenge specific unreliability of a particular machine. It does not let the defendant challenge the conclusion that the scale is generally reliable. The unconstitutionality lies in the existence of this conclusion which cannot be challenged.

If the jury is required to believe any conclusion that cannot be challenged, any such conclusion is an illegal irrebuttable mandatory conclusive presumption. Following the rationale in the court below, a presumption would only be unconstitutional if the state barred every possible defense that a defendant could offer. The mere

existence of parallel or alternate defenses does not make a conclusive presumption any less mandatory. It merely allows the defendant to prevail in another way despite the illegality of his trial. The presumption is rebuttable if and only if the conclusion itself can be challenged.

Showing that a presumption is rebuttable does not show that it is constitutional, it shows the reverse. If the defendant must rebut it to keep it from being mandatory, then the burden has been unconstitutionally shifted.

If general reliability cannot be challenged, then general reliability is being conclusively presumed. Allowing challenges to specific reliability does not justify barring challenges to general reliability. Allowing the defendant to show that the scale is malfunctioning does not justify barring him from showing that the design of the scale makes it incapable of weighing anyone who weighs over 250 pounds. This is especially true in cases where the scale is not broken and the general defense is the only one available.

Like the scale in the example, the Ohio breath testing machine also has a design defect. It frequently has trouble differentiating alcohol in stomach gasses or alcohol evaporating from the throat and mouth tissue of GERD sufferers from deep lung air. This stray alcohol mixes in with the deep lung breath that the machine is supposed to measure and causes an artificially high test result. The machine does not need to be broken for this error to occur, it is a problem of general reliability. This defect was in the proffer and thus must be assumed to be true for purposes of this case. Keeping this information from the jury is like hiding from the jury the fact that the scale in the hypothetical example could not produce an accurate reading for anyone weighing over 250 pounds.

Even if we assume arguendo that a presumption may substitute for proof beyond a reasonable doubt, there is still another problem. The presumption itself must be true.

> Where a mandatory presumption is used, the defendant may be convicted based upon the presumption alone as the result of the failure of the accused to introduce proof to the contrary. The court reasoned that in such an instance the presumption would be unconstitutional unless the basic facts, standing alone, are sufficient to support the inference of guilt beyond a reasonable doubt.

J. Strong, *McCormick on Evidence*, § 347 p. 470 (5th ed, Vol. 2, 1999).

As was mentioned above, the proffer, indicates both the expert witness and the National Safety Council agree that sample contamination can be a problem. Since the proffer must be accepted as true for these purposes, the presumption of general reliability is not supported by the facts. Therefore it must fail for this reason as well.

2. Where a scientific test result has been found admissible by a preponderance of the evidence in a pre-trial hearing, the mere test result is insufficient to constitute the sole proof of an element of an offense where no foundational evidence was submitted to the jury.

At no time did any finder of fact determine that the breath test used to convict the Petitioner was generally reliable beyond a reasonable doubt. The reliability of the test is the key, if not the only, real issue in most breath test cases. Ohio essentially dispenses with the need for proof beyond a reasonable doubt and bars defendants

from presenting a defense in such cases. This is not some regrettable error in an isolated case. It is standard practice in Ohio.

As was discussed above, *Vega, supra,* creates an irrebuttable mandatory conclusive presumption that the breath test is accurate and reliable. The premise which gives rise to this presumption is regulatory compliance. More egregiously, this premise is not even proven to the jury. Instead the issue is submitted to the court in a pretrial hearing. In that hearing the court uses a preponderance standard. Thus, even if the use of a conclusive presumption is somehow excusable, the burden of proof has also been reduced to a preponderance. Similarly, since evidence of reliability is not presented to the jury, the defendant also does not have the opportunity to cross examine on the issue of reliability or accuracy.

Under Ohio law, the longstanding procedure is that once regulatory compliance has been shown in a motion hearing, the breath test result is admissible. *Defiance v. Kretz* 1991), 60 Ohio St.3d 1, 573 N.E.2d 32. *Athens v. Wolf* (1974), 38 Ohio St.2d 67 O.O.2d 317, 313 N.E.2d 405 held that the standard of proof in a motion hearing is a preponderance. *Vega, supra,* holds that the general reliability of the breath test cannot be challenged.

This court's unanimous decision in *Crawford vs. Washington* (2004), 124 S.Ct. 1354, 158 L.Ed.2d 177, 72 USLW 4229. reversed a lower court as well as *Ohio vs. Roberts* because the lower court's holding:

> ". . .allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutional prescribed method of assessing reliability with a wholly foreign one." *id*, 124 S.Ct. 1370. "Where testimonial statements are at issue, the only

> indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

Id, 124 S.Ct. 1374.

In the case at bar, proof that the testing machine was reliable, was replaced by a "mere judicial determination of reliability" (or a combination of bureaucratic and judicial determinations). The defendant was not given the opportunity to cross examine concerning the accuracy of the test. The jury was instead instructed that the test was accurate. This is not constitutional under *Crawford.*

Recent cases such as *Apprendi v. New Jersey* (2000), 530 U. S. 466, 490 and *Blakely vs. Washington*, (2004) 124 S.Ct. 2531, 159 L.Ed.2d 403, 72 USLW 4546 make it clear that the defendant is entitled to a jury trial on all of the issues in his case. The Ohio procedure denies this right as well. Shifting the burden of proof to a preponderance also contravenes a long list of cases. See, for example, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (U.S.N.Y. Mar 31, 1970).

3. When offered by a defendant in a criminal case, speculative evidence cannot constitutionally be barred if it raises a reasonable doubt about a relevant issue.

Ohio evidence law, as set forth in *Vega, supra,* wrongly deprived the defendant of his constitutional right to present his only meaningful defense in violation of cases such as *Washington vs. Texas* (1967), 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019. Ohio evidence law does not trump the Constitution. When the two conflict, the Constitution must prevail. *Crawford, supra.*

The defendant was not allowed to discuss a known source of inaccurate readings which is acknowledged by the manufacturer, the Department of Health, the National Safety Council, reputable experts and courts of other states. On the basis of *Vega,* the jury was told that it could not consider whether the breath test was reliable. The defendant was prohibited from presenting truthful evidence that the testing machine is not always reliabile.

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane, supra,* at 690, 106 S.Ct. 2142 (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'

Holmes, supra 126 S.Ct. 1728.

It should be noted that Justice Alito wrote the opinion for a unanimous court. In *Holmes,* the lower court held that strong forensic evidence justified the exclusion of defense evidence which it considered weak. The Supreme Court held that: ". . .where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact. . ." *Holmes, supra,* 126 S.Ct. 1734.

If a court already strongly believes that it is true that the breath test is accurate, any evidence challenging the test seems misleading, speculative, and improper

because it challenges the truth. From that perspective, only evidence strong enough to overcome the court's strong belief will seem proper and therefore admissible. The problem, of course, is that the jury should be weighing the strength of the evidence, not the court.

The trial court cited the speculative evidence rule as a ground in addition to *Vega*. Adding an evidentiary reason for excluding exculpatory evidence of sample contamination due to GERD does nothing to cure the constitutional infirmity. Evidence of bloodshot eyes is routinely admitted but is actually quite speculative because there are a number of possible causes (smoke, dust, chlorine, allergies, fatigue, contact lenses, etc.). Presenting the defendant's use of the medication Zantac as evidence of GERD, on the other hand is not very speculative at all, because, according to the proffer, GERD is virtually the only reason for taking Zantac. The evidence of bloodshot eyes only seems more reliable because it is consistent with what is perceived to be the truth, namely that the test is accurate. The GERD evidence seems questionable because it questions what is perceived to be the truth.

Thus the GERD evidence is falsely perceived as being speculative not due to the nature of the GERD evidence itself, but rather because it questions the court's belief about the accuracy of the test. Excluding defense evidence because the government's forensic case seems strong is precisely what was found to be improper in *Holmes*. In *Holmes*, the court essentially barred defense evidence of third party guilt because it thought the state's case was so strong that it would be misleading or speculative to let the defendant argue someone else committed the crime.

> . . .[T]he State Supreme Court held that "where there is strong evidence of an appellant's guilt,

> especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence."361 S.C., at 342-343, 605 S.E.2d, at 24. Applying this standard, the court held that petitioner could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence."

Holmes, supra, 126 S.Ct. 1731.

The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, the petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of the petitioner's guilt.

The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have " 'a

> meaningful opportunity to present a complete defense.' " Crane, 476 U.S., at 690, 106 S.Ct. 2142 (quoting Trombetta, 467 U.S., at 485, 104 S.Ct. 2528).

Holmes, supra, 126 S.Ct. 1735.

There are at least three problems with barring defendant's evidence. First, requiring the defendant's evidence to be strong before it can be admitted is unconstitutional. Defense evidence need not be strong to be admitted, it only needs to be sufficient to raise one reasonable doubt in the mind of the jury. Second, when the judge evaluates evidence to see if it is strong enough before it is admitted he is invading the province of the jury. Third, there was no trial evidence regarding the accuracy of the test in this case. Therefore, the probative value of the defendant's evidence was being weighed against preconceived notions as to the accuracy of the test, not against any actual evidence which was produced at trial. How could the defendant's evidence be weaker than no evidence at all?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:

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